RECENT CASES.

ADVERSE POSSESSION — CONTINUITY — GRANTEE OF ONE HAVING TITLE BY ADVERSE POSSESSION. — The plaintiff's grantor occupied, together with his own land, a strip adjoining, to which the defendant now holds the paper title. After adverse possession of the strip for more than the statutory period, the plaintiff's grantor gave possession of the whole tract to the plaintiff, executing a deed which failed to include the added strip, although both parties intended its conveyance. *Held*, that the plaintiff may maintain an action to quiet title. *Clithero* v. *Fenner*, 99 N. W. Rep. 1027 (Wis.).

The court apparently relies on the general rule that where one in adverse possession transfers his rights to another, the transferee acquires title when the combined length of his own and the previous terms of adverse possession reaches the statutory period. *Cf. McNeely* v. *Langan*, 22 Oh. St. 32; *Davock* v. *Nealon*, 58 N. J. Law 21. In the present case, however, the plaintiff's grantor had acquired title before the transfer, by his adverse possession. *Schall* v. *Williams Valley R. R. Co.*, 35 Pa. St. 191. Since the legal title thus became vested, the plaintiff no longer had any claim based on his own possession adverse to the holder of the paper title. Nor did the plaintiff acquire the legal title by the conveyance. The strip was not described in the deed, nor could it pass as appurtenant to the other land. *New Orleans, etc., Ry. Co.* v. *Parker*, 143 U. S. 42. A number of states have passed statutes permitting the holder of a merely equitable title to maintain an action to quiet title, but no such statute being in force in Wisconsin, it would seem that the defendant should have had judgment.

BANKRUPTCY — COMPOSITIONS. — The Bankruptcy Act of 1898 provides that the bankruptcy courts may confirm a composition assented to by the majority of creditors. *Semble*, that where the composition is assented to by all the creditors a subsequent promise will not revive the balance of the old liability. *Taylor* v. *Skiles*, 81 S. W. Rep. 1258 (Tenn.). See NOTES, p. 59.

BANKRUPTCY — PETITIONS IN BANKRUPTCY: INVOLUNTARY PROCEEDINGS — COMPUTING NUMBER OF CREDITORS. — The assignee under a general assignment, to which a large number of creditors assented, bought up twelve claims which he re-assigned to different persons, to keep alive enough claims to defeat the provision of section 59 b of the Bankruptcy Act permitting one of the creditors, when there are less than twelve, to petition in involuntary bankruptcy. *Held*, that the creditors thus created are excluded in computing the number of creditors under this clause. *Leighton* v. *Kennedy*, 129 Fed. Rep. 737 (C. C. A., First Circ.).

Courts generally invalidate attempts to frustrate the purpose of bankruptcy legislation. It is clearly the intent of the Bankruptcy Act not to allow the bankrupt or his assignee to deprive a creditor of his right to petition by creating new friendly creditors through re-assignments of purchased claims. Such colorable proceedings would practically nullify the provision in favor of one creditor. A similar move to obtain the requisite number of petitioners by splitting up one claim failed. *In re Independent Thread Co.*, 113 Fed. Rep. 998. And while a creditor has been permitted to buy up claims to bring himself within the statutory requirements, the present decision, under the existing authorities, seems sound. *Cf. In re Woodford and Chamberlain*, 13 N. B. Rep. 575. Another contention might have been made. It has been held that creditors assenting to a general assignment are not creditors within section 59 b *supra*. *In re Miner*, 104 Fed. Rep. 520. That question, however, is still doubtful, and assuming, as seems probable, that the number of such creditors in this case was at least twelve, the appellant might have contended that that section should not apply. See 14 HARV. L. REV. 461.

BANKRUPTCY — PREFERENCES — TIME WITHIN WHICH TRUSTEE MUST SUE TO AVOID. — *Semble*, that in order to avoid a preference, the trustee must make his demand a sufficient length of time before the expiration of the year within which all claims must be proved against the bankrupt estate, to afford the preferred creditor a reasonable time in which to surrender the preference and exhibit his claim against the estate. *Swartz* v. *Frank*, 82 S. W. Rep. 60 (Mo., Sup. Ct.) See NOTES, p. 55.

BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — BANKRUPT A CONSTRUCTIVE TRUSTEE OF CONCEALED ASSETS. — The plaintiff secured a discharge in bankruptcy without the appointment of a trustee, as he disclosed no assets. He then sued on a claim that he erroneously but honestly failed to disclose at the time of the discharge. A statute provided that only the real party in interest might sue. *Held*, that the plaintiff cannot maintain his action. *Rand* v. *Iowa Central Ry. Co.*, 96 N. Y. App. Div. 413.

This case involves in a novel way the relation of a bankrupt to assets discovered after his discharge and the close of his estate. Under subdivision eight of section two of the Bankruptcy Act of 1898, a bankrupt, or a creditor who took part in the former proceedings, may petition the court to reopen the estate to administer newly discovered assets, without disturbing the discharge. *In re Shaffer*, 104 Fed. Rep. 982 (*semble*); *In re Newton*, 107 Fed. Rep. 429 (*semble*). On the basis of this recognition of the clear right of creditors to reach these assets, the New York court seems justified in making the bankrupt a constructive trustee of them. It seems clear that the entire beneficial interest is in the creditors; the bankrupt has only a dry legal title. Accordingly he is not entitled to sue as the real party in interest.

CARRIERS — DUTY TO TRANSPORT AND DELIVER — WAIVER OF RIGHT TO DEMAND BILL OF LADING. — The defendant, a carrier, refused to accept the plaintiff's tender of freight charges and to deliver certain goods to him, claiming excessive freight. At that time the latter did not have the bill of lading, but later obtained and presented it and was given the goods, which had in the meantime been damaged by frost. The plaintiff sued for damages. *Held*, that the defendant cannot set up the plaintiff's failure to present the bill of lading. *Clegg* v. *Southern Ry. Co.*, 47 S. E. Rep. 667 (N. C.).

Where tender of performance of an act is necessary to acquire a right of action, but the party to whom tender is due shows by his conduct that he would not accept it, the prevailing view seems to be that such tender is waived. *Sonia, etc., Co.* v. *Steamer Red River*, 106 La. Ann. 42; *Keller* v. *Fisher*, 7 Ind. 718. By analogy it may be urged that the defendant waived his right to insist on the presentation of the bill of lading, since his conduct fairly indicated that, even if it had been produced, he would still have refused to deliver. Furthermore, the case seems to be within the principle that where tender of performance is refused on one ground, such refusal cannot later be defended on another ground. *Polglass* v. *Oliver*, 2 C. & J. 15. If the defendant had required a bill of lading instead of insisting solely upon the payment of excessive charges, the plaintiff might at once have obtained the bill. The plaintiff's failure to fulfill all requirements, then, fairly resulted from the defendant's conduct, and the latter should not be allowed to take advantage of that failure. *Louisville, etc., R. R. Co.* v. *McGuire & Co.*, 79 Ala. 395.

CHATTEL MORTGAGES — NOTICE UNDER THE RECORDING ACTS. — A commission merchant sold mortgaged cattle and remitted the proceeds of the sale to the consignor, without actual knowledge of the existence of the mortgage, which was recorded. The mortgagee sought to recover the amount of the net proceeds from the commission merchant in an action for money had and received. *Held*, that the plaintiff may recover. *Greer* v. *Newland*, 77 Pac. Rep. 98 (Kan.). See NOTES, p. 54.

CHOSES IN ACTION — MANNER AND EFFECT OF ASSIGNMENT — EFFECT OF STATUTE. — A statute provided that the real party in interest must sue. *Held*, that the partial assignee of a chose in action may join with the assignor in an action at law against the obligor. *Firemen's, etc., Co.* v. *Oregon, etc., Co.*, 76 Pac. Rep. 1075 (Ore.).

Courts of law refuse to allow an action by a partial assignee for two reasons: first, that at law no divided judgment can be pronounced; second, that to allow him a separate action would subject the obligor to more than one suit. *Mandeville* v. *Welch*, 5 Wheat. (U. S.) 277. Equity, however, everywhere protects the partial assignee. The statute providing that the real party in interest must sue did not remove the difficulty as to the number of parties to an action at law. The court in the principal case followed the *dicta* in two previous cases. See *State, etc., Co.* v. *Oregon, etc., Co.*, 20 Ore. 563; *Home, etc., Co.* v. *Oregon, etc., Co.*, 20 Ore. 569. These *dicta* were based upon decisions in New York and Wisconsin, where law and equity are administered in one forum without regard to the form of the action. In Oregon the two courts are distinct. In New Jersey, under a similar statute, the court reached the opposite result. *Otis* v. *Adams*, 56 N. J. Law 38. Since, under such statutes, misjoinder of parties has been held fatal, the decision is also opposed to those cases, arising under them, which hold that the assignor may sue without joining the assignee. *Leese* v. *Sherwood*, 21 Cal. 151.

CONFLICT OF LAWS — JURISDICTION — RIGHT ACQUIRED UNDER FOREIGN STATUTE. — A citizen of the United States was killed in Mexico through the negligence of the defendant, a Colorado corporation. Under the Mexican statute giving an action for death by wrongful act, the liability of the defendant was limited to furnishing support to the legal dependents of the deceased during the periods of time that support would have been due from him, payments being made in monthly instalments. Action was brought under this statute by the proper parties in the United States Circuit Court. *Held*, that the federal court has no jurisdiction. *Slater* v. *Mexican, etc., R. R. Co.*, 194 U. S. 120.

For a discussion of this case, see 16 HARV. L. REV. 63.

CONFUSION — ACCOUNTS — FRAUD BY LESSEE. — A company leased the natural gas privileges from the plaintiff's land, contracting to pay him one-quarter of the profits therefrom. The lessees fraudulently mixed this gas with that from other properties, and declared themselves unable to determine what proportion of the mixture had come from the plaintiff's property. *Held*, on a bill for an accounting, that the company is liable for one-fourth of the profits on the whole of the mingled gas. *Stone* v. *Marshall Oil Co.*, 208 Pa. St. 85.

The principle relied on by the court in estimating the amount of the plaintiff's recovery applies both in law and in equity. Whenever there is fraudulent confusion, either of property or accounts, without means of determining the share of each party, the innocent owner will be protected, at whatever risk to the rights of the confuser. *Diversey* v. *Johnson*, 93 Ill. 547; *Graham* v. *Plate*, 40 Cal. 593. In the present case, the only settlement which involved no danger of injustice to the innocent plaintiff was the one adopted. *Cf. Kleppner* v. *Lemon*, 197 Pa. St. 430. In the corresponding cases involving ownership rather than accounting, the decisions merely vindicate the innocent owner's right to take and keep the whole until the confuser designates his share. When the question of damages for conversion of such a mass does arise without data as to the proportions belonging to the interested parties, there is little doubt that the full value of the mixture will be awarded. The present analogous case in confusion of accounts appears to support this view.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — EXCLUSION OF ALIENS AS A JUDICIAL QUESTION. — The petitioners, Chinese persons, applied for admission to the United States, but were refused admission and detained by the immigration officers on the ground that they were not citizens of the United States and not within the classes entitled to admission. The petitioners refused to answer the questions asked by the officers or to appeal to the Secretary of Commerce and Labor, as allowed by the statute, but instead applied for discharge from custody on *habeas corpus*, alleging citizenship. *Held*, that the petition must be dismissed and the petitioners remanded. *United States* v. *Sing Tuck*, 194 U. S. 161.

This decision of the supreme court overrules that of the circuit court of appeals and affirms that of the circuit court. For a discussion of the principles involved, see 17 HARV. L. Rev. 488.

CONTRACTS — DEFENSES — PERFORMANCE RENDERED IMPOSSIBLE BY LAW. — The lessee of an electric car line belonging to a municipal corporation contracted to allow an advertiser the exclusive right of advertising in its cars for a certain time. At the instance of the lessee, a clause impowering the corporation to take over its lines was inserted into an act of Parliament. The corporation exercised its power, and thereby made performance of the advertising contract impossible. *Held*, that the lessee is liable on the contract. *Re Companies' Acts*, 117 L. T. 60 (Eng., Ch. D.).

The present decision apparently creates a new modification of an old legal principle. It is generally held that when performance of a contract is rendered impossible by law the promisor is excused. *Bailly* v. *De Crespigny*, L. R. 4 Q. B. 180. But in the present case the defendant was not allowed to plead, as an excuse for not performing its contract, a law which it had caused to be introduced into Parliament, and which rendered performance impossible. This result seems sound. The case is analogous to those in which the subject matter of a contract has been destroyed by the defendant. Under such circumstances, the courts have held that he cannot successfully plead facts which would otherwise have afforded him an excuse. *Cf. Stanton* v. *New York, etc., R. R. Co.*, 59 Conn. 272. That the defendant created the impossibility by means of an act of Parliament should not affect the validity of the analogy. The argument in both instances is based upon the same rule of common sense, that no one should be allowed to take advantage of his own wrong to the injury of another.

CONTRACTS — RESCISSION — ACTION FOR RESTITUTION. — The plaintiff contracted to sell a tract of land to the defendant, who paid £100 cash and agreed to pay

the balance of the purchase price in specified instalments. The first instalment was offered by the defendant four days after the date set by the contract. An agreement postponing payment had been made, and the evidence was conflicting as to whether the time had been extended to the date of the defendant's tender. The plaintiff asked restitution and damages. *Semble*, that delay in paying one instalment of a contract is not ground for rescission, unless an intention to repudiate has been manifested by the party in default. *Moroney* v. *Roughan*, 29 Victorian L. Rep. 541. See NOTES, p. 61.

CRIMINAL LAW — ACQUIESCENCE FOR DETECTION. — The defendant plotted to obtain certain indictments by bribery and to destroy them. The district attorney, for the purpose of apprehending the defendant in the commission of crime, instructed his employees to accept the defendant's proposition and to deliver the indictments in return for a consideration. The defendant was indicted for an attempt to obtain documents from an official unlawfully and to commit grand larceny. *Held*, that the defendant is guilty. *People* v. *Mills*, 178 N. Y. 274.

It seems well settled that when government officials suggest and originate the crime in order to prosecute, there can be no conviction of the offender. *United States* v. *Adams*, 59 Fed. Rep. 674. Where they have merely made the perpetration of the criminal act possible or easy the tendency undoubtedly is to hold the defendant for that act. The principal case has no precedent in New York, but the court takes the position that since a public officer in such circumstances acts in excess of his authority his official position is immaterial, and the right of the state to punish is not affected. A like decision has been reached in Michigan. *People* v. *Liphardt*, 105 Mich. 80. The reasoning of these cases would go far toward removing all disability resting upon the state as the result of the encouragement of crime by its agents. It is submitted that the question of most importance in such cases is not whether the officer exceeds his authority, but how far the state is willing to countenance the use by its agents of such methods of procuring a conviction. See *Saunders* v. *People*, 38 Mich. 218.

EQUITY — PROCEDURE — NECESSARY PARTIES TO SUIT. — A bill was brought in New Jersey by a stockholder in a Maine corporation alleging that the defendant, a New Jersey corporation, was by virtue of an agreement with the former corporation in possession of a large portion of its assets which it was about to transfer to a New York corporation and asking an injunction to restrain such transfer. It had already been decided that the court had no jurisdiction over the New York corporation, and it was now moved to dismiss the suit on the ground that the latter was a necessary party defendant. *Held*, that the motion be dismissed. *Wilson* v. *American, etc., Co.*, 58 Atl. Rep. 195 (N. J., Sup. Ct.). See NOTES, p. 57.

EVIDENCE — CONFESSIONS — CRIMINATING STATEMENTS. — The defendant, charged with murder, was subjected at the inquest to a rigid cross-examination by the county attorney, during the course of which he made this statement, "I may have done it, but I don't know anything about it. My mind is a perfect blank." At the trial this was admitted in evidence. *Held*, that the statement was not freely and voluntarily made, and should not have been admitted. *Parker* v. *State*, 80 S. W. Rep. 1008 (Tex., Cr. App.).

According to the common restriction of confessions to acknowledgments of guilt, the words quoted amount merely to a criminating statement; for they expressly negative the criminal intent. See *People* v. *Parton*, 49 Cal. 632. As to whether the test of admissibility usually reserved for confessions — that they must be voluntary — should be extended to such statements, the authority, though slight, is in conflict. See *People* v. *Hickman*, 113 Cal. 80; *Fletcher* v. *State*, 90 Ga. 468. If, however, the extension of the rule be approved, the propriety of its application here may still be questioned. See *Commonwealth* v. *Cuffee*, 108 Mass. 285. The real basis of the rule requiring that confessions to be admissible must have been voluntary, is the desire to secure reliable evidence, and not any idea of indulgence to the defendant; and it would seem that in most cases confessions elicited in cross examination would be sufficiently free from undue influence. The practice of admitting at trials confessions made at preliminary examinations, supports this view. *Wilson* v. *United States*, 162 U. S. 613. Conceivably, however, in extreme cases, the accused might through alarm or nervousness be led into making untrustworthy statements; and upon this ground the principal case may possibly be supported. See *Gallaher* v. *State*, 40 Tex. Cr. Rep. 296.

EVIDENCE — DECLARATIONS AGAINST INTEREST — ADMISSIBILITY TO CONTRADICT RECORD TITLE. — The defendant's predecessor in title of certain land, while in possession under a deed purporting to be made by A, stated that the deed was forged. The defendant's title, however, was good of record. After the declarant's death, in a

suit to recover the land brought by the plaintiffs as heirs of A, the above statement was admitted in evidence to contradict the defendant's title. *Held*, that a new trial be granted. *Phillips* v. *Laughlin*, 58 Atl. Rep. 64 (Me.).

The court proceeds partly upon the ground that admissions by a privy in estate are not receivable in evidence to contradict a record title. That the weight of authority is in support of this proposition cannot be doubted. *Gibney* v. *Marchay*, 34 N. Y. 301. Nevertheless, the decision seems contrary to the general principles of the law of evidence. In favor of the decision, it is argued that the policy of our recording laws demands that *bona fide* purchasers should have a right to rely upon the record as showing the exact facts. See *Cook* v. *Knowles*, 38 Mich. 316, 330. On the other hand, it has been held repeatedly that where an innocent purchaser buys land from a grantee who has fraudulently procured a deed from one with whom it had been deposited in escrow and has placed the same on record, he acquires no title. *Everts* v. *Agnes*, 6 Wis. 453. So here it seems clear that if the deed to the defendant's grantor was forged, the defendant never acquired title; and that any fact tending to prove such forgery was entirely relevant to the issue. The evidence offered did tend to prove such forgery, and, regarded either as an admission or as a declaration against interest, came within the exceptions to the hearsay rule. *Cf. Dickerson* v. *Chrisman*, 28 Mo. 134; *Currier* v. *Gale*, 14 Gray (Mass.) 504.

EVIDENCE — DEEDS — PERFORMANCE OF CONDITIONS OF ESCROW. — In a suit in equity under a statute, the plaintiff alleged that the defendant had obtained possession of a deed delivered by the former in escrow, without performing the conditions, under which he was claiming; and prayed a declaration by the court that the plaintiff's title be adjudged good. The defendant alleged performance of the terms of the escrow. After the plaintiff had introduced in evidence a copy of the deed conveying the premises to him, and documents tending to prove the defendant irregularly in possession of his conveyance, a nonsuit was granted. *Held*, that the burden of proof is upon the plaintiff to show non-performance of the conditions. *Swain* v. *McMillan*, 76 Pac. Rep. 943 (Mont.).

There is authority in conflict with the proposition here broadly laid down. *Black* v. *Shreve*, 13 N. J. Eq. 455. The question as to burden of proof is properly dependent upon the pleadings and substantive law in the particular case. See THAYER, PREL. TREAT. EV. 371. The rule, as usually stated, is to the effect that he has the burden who has the affirmative of an issue to maintain. *Central Bridge Co.* v. *Butler*, 2 Gray (Mass.) 130. To apply this test it is necessary to determine in every instance the essential allegations in each party's case and pleading. The case under discussion being practically a statutory modification of a bill to quiet title, the plaintiff makes all essential allegations when he avers his own title and the defendant's adverse claim; it is then for the defendant to plead and prove his title. See *Ely* v. *New Mexico, etc., R. R.*, 129 U. S. 292. And as a deed in escrow delivered without performance of conditions is null, the defendant should prove performance. Possession by the grantee is, however, *prima facie* evidence of such performance, and the case may be supported upon the theory that the plaintiff's evidence did not rebut this presumption. See *Hare* v. *Horton*, 2 Nev. & M. 428.

EVIDENCE — ENTRIES MADE BY A PERSON OTHER THAN THE ORIGINAL OBSERVER. — A book composed of entries made by the plaintiff's clerk from scale tickets recording the weighing of cattle was offered in evidence under the oath of the clerk. *Held*, that the evidence is admissible. *Drumm-Flato Com. Co.* v. *Derlack Bank*, 81 S. W. Rep. 503 (Mo., Ct. App.). See NOTES, p. 52.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY OR AGAINST EXECUTORS — CONTINGENT CLAIMS. — A testator during his life assigned certain leasehold properties. There remained a contingent liability on certain covenants in the leases. The executors sought to hold back a large fund from the residuary legatees to protect the lessors. *Held*, that the executors must turn over the money to the residuary legatees. *In re Nixon*, [1904] 1 Ch. 638.

There are two possible grounds for setting aside the assets: first, to indemnify the executors, second, to protect the lessors. Assets are not set aside to indemnify executors, for it is an acknowledged principle that a decree of the court, directing an executor who has disclosed all facts to distribute the property, relieves him from liability. *Dean* v. *Allen*, 20 Beav. 1. The second ground has not been favored in England. *Dodson* v. *Sammell*, 1 Drew. & Sm. 575. Conversely, courts have held that the lessor himself cannot come into court to have assets withheld. *King* v. *Malcott*, 9 Hare 692. The court in the principal case proceeded on the assumption that the lessor was not a creditor. This seems opposed to the analogous cases under the

English Bankruptcy Act, holding that owners of contingent claims may prove the same. *Wolmerhausen* v. *Gullick*, [1893] 2 Ch. 514. Such claimants seem entitled to protection in probate courts as well as in bankruptcy proceedings; and such was the effect of the earlier English cases. *Cochrane* v. *Robinson*, 11 Sim. 378. In this country such creditors are generally protected by statutes, although beneficiaries are often allowed to receive their legacies upon giving bonds to secure holders of contingent claims. See *Cobb* v. *Kempton*, 154 Mass. 266; *Clark* v. *Holbrook*, 146 Mass. 366.

FIXTURES — EFFECT OF NEW LEASE ON TENANT'S RIGHT OF REMOVAL. — The defendant, a lessee, within his term began to remove trade fixtures which he had put in during a previous lease. His possession had been continuous, but near the end of his first term a new lease renewing and extending the one in force had been executed. The landlord sought to enjoin him from severing the fixtures. *Held*, that the injunction should not be granted. *Rady* v. *McCurdy*, 58 Atl. Rep. 558 (Pa.).

For a discussion of the principles involved, see 15 HARV. L. REV. 862.

HUSBAND AND WIFE — CONTRACTS BETWEEN HUSBAND AND WIFE — AVOIDANCE OF STATUTE. — A statute declared all contracts between husband and wife involving real estate void. In consideration of his wife's promise to bequeath certain property to designated persons, a man agreed to and did devise his estate to her; but the wife failed to perform her agreement. *Held*, that she takes the property *ex maleficio* in trust for the parties beneficially interested. *Laird* v. *Vila*, 100 N. W. Rep. 656 (Minn.).

It is well settled that equity will compel the conveyance of an estate, pursuant to an oral agreement, after such part performance by the promisee as would make failure to convey a fraud in law. *Earl of Aylesford's Case*, 2 Stra. 783; *Johnson* v. *Hubbell*, 10 N. J. Eq. 332. The theory commonly advanced is that the Statute of Frauds cannot be invoked in aid of fraud. See *Montacute* v. *Maxwell*, 1 P. Wms. 618; *Maddison* v. *Alderson*, L. R. 8 A. C. 467. It would, however, seem more accurate to say that the fraud upon the promisee who has changed his position in consequence of the promisor's representations raises a constructive trust in favor of the former. Such a trust, not being within the statute, may be enforced in equity without regard to the original agreement. See *Maddison* v. *Alderson*, *supra*. The situation in the principal case seems analogous. The breach of a promise to hold property for a third person's benefit, given as the inducement for a will in favor of the promisor, is such fraud as will convert the devisee into a constructive trustee. *Thynn* v. *Thynn*, 1 Vern. 296. Hence though, by statute, the original contract is unenforceable, yet equity should compel the execution of this constructive obligation. *Ahrens* v. *Jones*, 169 N. Y. 555.

HUSBAND AND WIFE — RIGHTS OF HUSBAND AGAINST WIFE AND IN HER PROPERTY — RIGHT IN SEPARATE ESTATE. — A husband conveyed land to his wife to her separate use. After children were born, the wife died. *Held*, that the husband is not tenant by the curtesy. *Bingham* v. *Weller*, 81 S. W. Rep. 843 (Tenn.).

It is settled that, unless expressly excluded, a husband is entitled to curtesy in land conveyed by a third person for his wife's separate use, whether the conveyance is directly to her or to a trustee. *Baker* v. *Heiskell*, 1 Coldw. (Tenn.) 641; *Carter* v. *Dale, Ross & Co.*, 3 Lea (Tenn.) 710. It is submitted that the same result should be reached where the husband makes the conveyance. He has the same purpose, — to provide for his wife during her life, with power to exclude him forever by transfer, — and this purpose is not defeated by allowing curtesy. The estate and powers given her are the same. The argument that curtesy is presumably excluded because the deed is absolute and to allow curtesy would derogate from the grant is unsound, since the deed does not distinguish the fee simple passed from any other held by the wife, and it is hardly derogation not to pass an interest by way of curtesy which is not possessed at the time. The weight of authority supports this view, whether the husband conveys to a trustee for the wife or directly to her. *Ball* v. *Ball*, 20 R. I. 520; *contra*, *Sayers* v. *Wall*, 26 Gratt. (Va.) 354.

INNKEEPERS — DUTY TO GUESTS — TORT OF SERVANT. — The plaintiff, a guest at the defendant's hotel, while seated at the dinner-table, was assaulted and beaten by one of the waiters. The plaintiff brought action to recover damages of the master for the tort of the servant. *Held*, that the defendant is not liable. *Rahmel* v. *Lehndorff*, 142 Cal. 681.

For a discussion of the principles involved in this case, see 17 HARV. L. REV. 575.

INSURANCE — MUTUAL BENEFIT SOCIETIES — RIGHT OF EXECUTOR TO SUE FOR DEATH BENEFIT FUND. — The by-laws of a mutual benefit association provided for the payment of a death benefit fund to the widow, children, or next of kin of a

deceased member. *Held*, that the executor of a member cannot maintain an action to recover the fund. *Gould* v. *United, etc., Ass'n*, 58 Atl. Rep. 624 (R. I.).

This decision is supported by the great weight of authority. *Eastman* v. *Provident, etc., Ass'n*, 62 N. H. 555. In Massachusetts, however, it is only since the passage of comparatively recent statutes that a sole beneficiary on an insurance or mutual benefit contract has been allowed to sue. *Dean* v. *American Legion of Honor*, 156 Mass. 435. Consequently the personal representative of the deceased has there been allowed to recover as trustee for the beneficiary. *Flynn* v. *Massachusetts Benefit Ass'n*, 152 Mass. 288. The principal case apparently decides the point for the first time in Rhode Island, in opposition to a *dictum* in an earlier case. See *Munroe* v. *Providence, etc., Ass'n*, 19 R. I. 363. There seems no reason why the executor, as personal representative of the deceased, should recover more than nominal damages for a breach of contract involving no actual loss to the estate. Where he is expressly named as trustee he may well bring suit as such. *Greenfield* v. *Massachusetts, etc., Co.*, 47 N. Y. 430. In other instances, as the court argues, it is no part of an executor's duty to act as trustee for the beneficiary, who in most jurisdictions is able to recover in his own right.

MINES AND MINERALS — TRESPASS — RIGHT TO TUNNEL UNDER ANOTHER'S CLAIM. — The plaintiff and the defendant were owners of adjoining mining claims. A statute granted to locators the right to pursue into and through any adjoining claims all veins apexing in their location. The defendant, for the purpose of reaching and working a vein which apexed in his, and extended under, the plaintiff's claim, projected a tunnel through the latter's land. *Held*, that an injunction should be granted restraining the further prosecution of the tunnel. *St. Louis, etc, Co.* v. *Montana Mining Co.*, 194 U. S. 235.

The decision of this case establishes two propositions: first, that, except as limited by the statute, the land lying vertically beneath a surface location belongs to the owner of that location, and second, that the statute does not grant the right to enter upon or tunnel another's land, except within the bounds of a vein. The first point has been repeatedly affirmed by the state and federal courts. *Cf. Doe* v. *Mining Co.*, 54 Fed. Rep. 935. Such decisions, together with the statutes under which they were decided, show a long prevalent tendency to increase the property rights of the owner of a mining claim. The movement reaches its culmination in the present case, which establishes what virtually amounts to a common law ownership. In regard to the second point also, the interpretation of the court appears to be in accord with the prevailing opinion. *Cf. Parrot, etc., Co.* v. *Heinze*, 25 Mont. 139. Since the statute is in plain derogation of the common law principles of the ownership of property, the court seems justified in adhering to a strict interpretation of its terms.

MORTGAGES — FORECLOSURE — EFFECT OF USURY ON RIGHT OF PURCHASER OF EQUITY OF REDEMPTION. — The defendant loaned twelve hundred dollars on the security of a mortgage and a note for sixteen hundred dollars, four hundred of which was exacted as a premium. The mortgagor conveyed the land to the plaintiff subject to a mortgage of twelve hundred dollars. The latter had no knowledge of the premium, so that it was not estimated in fixing the purchase price. The twelve hundred dollars with interest was paid. After foreclosure by the defendant for the remainder, the plaintiff sued to set aside the sale on the ground that the premium exacted was usurious. *Held*, that the amount of the premium is usurious, and, as it was not figured into the purchase price, the sale must be set aside. *Lewis* v. *Farmers', etc., Ass'n*, 81 S. W. Rep. 887 (Mo., Sup. Ct.).

It is a general rule that the purchaser of an equity of redemption, who buys subject to the mortgage, cannot attack the validity of the mortgage on the ground of usury. *Lee* v. *Stiger*, 30 N. J. Eq. 610. But where one buys from a mortgagor without any deduction from the purchase price on account of the incumbrance, in most jurisdictions the defense of usury is allowed. *Maher* v. *Lanfrom*, 86 Ill. 513. It seems to follow logically that where only a part of the incumbrance is figured into the purchase price, a defense as to the rest should be allowed. The only reason for withholding the defense seems to be that the purchaser, by retaining out of the price he agreed to pay sufficient money to pay the mortgage, has placed himself in a position where he cannot plead usury without attempting to defraud both his grantor and the mortgagee. *Trusdell* v. *Dowden*, 47 N. J. Eq. 396. In the principal case, as the amount of the premium was not considered in determining the price paid, this reason for refusing relief did not exist.

NUISANCE — ACCRUAL OF ACTION — NEGLIGENCE. — One without proprietary interest in his place of residence sought to recover damages for sickness caused by a palpably foul well on the defendant's adjacent land. *Held*, that the plaintiff may recover. *Ft. Worth, etc., Ry. Co.* v. *Glenn*, 80 S. W. Rep. 992 (Tex., Sup. Ct.).

The court concedes that to recover for a nuisance causing mere personal annoyance in the enjoyment of real property or damage to it, a plaintiff must show legal interest in it to the extent, at least, of possession. *Kavanagh* v. *Barber*, 131 N. Y. 211. But it distinguishes a second class of nuisances, composed of those which, as in the principal case, cause physical injury to the person and allow recovery without a property basis. This distinction was maintained by the lower court in a New York case which, however, was reversed on other grounds by the higher court. *Hughes* v. *City of Auburn*, 21 N. Y. App. Div. 311; *contra*, *Ellis* v. *Kansas City, etc., R. R. Co.*, 63 Mo. 131. This conflict over the scope of nuisance could be wisely avoided by considering cases of the second class not under that most indefinite head, nuisance, but under the law of negligence. The defendant should use due care to prevent the escape from his premises of unhealthful air liable to cause physical injury to people in the vicinity. This duty he seems to have violated in the principal case and so was properly held liable. See *Holly* v. *Boston Gas Light Co.*, 8 Gray (Mass.) 123.

PARTNERSHIP — DISSOLUTION AND WINDING-UP — TERMINATION OF CONTRACT BETWEEN ATTORNEY AND CLIENT. — After the death of one member of a law partnership employed to conduct certain litigation, partly on a contingent basis, the appellees engaged the surviving partner, under a new agreement, in his individual capacity. The litigation having succeeded, the executors of the deceased partner sought to recover his share of the contingent fee under the original contract. *Held*, that the executors may recover. *Clifton* v. *Clark, Hood & Co.*, 36 So. Rep. 251 (Miss.).

A retainer of a law firm creates a personal contract and may be terminated by a dissolution of the partnership. *McGill* v. *McGill*, 2 Met. (Ky.) 258. It is sought to take the present case out of this rule because the services of no specific partner were engaged and the litigation was in fact completed by the surviving partner. But in retaining a firm, a client is entitled to the skill and reputation of all, even though he cannot demand the services of any particular member. While the surviving partner must stand ready to complete pending business, the client may exercise a choice. *Little* v. *Caldwell*, 101 Cal. 553. If he permit the work to be pursued he is bound to his contract. *Page* v. *Wolcott*, 15 Gray (Mass.) 536. But in terminating the agreement, it ought to make no difference whether he retains an outsider, or the surviving partner in his individual capacity. The deceased partner's estate should recover quasi-contractually for past services which were beneficial in continuing the litigation, even where the fee is contingent upon success, if the contingency has occurred. See *Badger* v. *Celler*, 41 N. Y. App. Div. 599.

RAILROADS — LIABILITY FOR DAMAGE TO ANIMALS — FENCING STATUTES. — A statute required railroad companies to fence their rights of way, and provided that failure to comply should render them liable in damages to the owners of injured cattle. The plaintiff's colt escaped from its owner, travelled several miles along a highway, broke through a fence into the field of a third party, and thence through the defendant railroad's defective fence to its track, where it was run over by the defendant's engine. *Held*, that the defendant is liable. *Rinehart* v. *Kansas, etc., Ry. Co.*, 80 S. W. Rep. 910 (Mo., Ct. App.).

In interpreting statutes similar to the Missouri enactment, courts have differed, and even in Missouri the decisions are conflicting. See *Ferris* v. *St. Louis, etc., Ry. Co.*, 30 Mo. App. 122. Certainly one object of such enactments is the protection of the travelling public. *Dickson* v. *Omaha, etc., R. R. Co.*, 124 Mo. 140. As to the owners of animals, in England and some eastern states only those whose animals were rightfully upon property adjoining the right of way, and were injured through the railroad's failure to fence, can recover. *Eames* v. *Salem, etc., R. R. Co.*, 98 Mass. 560. Many western jurisdictions, however, hold with the principal case that the railroad is liable even to owners of trespassing animals. *McCall* v. *Chamberlain*, 13 Wis. 637. In the former jurisdictions the common law rule generally prevails, requiring the owner of animals to keep them in at his peril. In some western states this rule is not in force, stock being allowed to graze at large. *Wagner* v. *Bissell*, 3 Ia. 396. This in part accounts for the conflict in interpretation, and makes it possible to support both lines of authority without violating the principle that to recover under a statute, the plaintiff must show that he is one of the class which the legislature intended to protect.

RES JUDICATA — WHAT JUDGMENTS ARE CONCLUSIVE — DISMISSAL BY CONSENT. *Semble*, that a dismissal of a suit by agreement of the parties will not bar a later action upon the same subject-matter between the same parties. *Lindsay* v. *Allen*, 82 S. W. Rep. 171 (Tenn.). See NOTES, p. 60.

TENANTS IN COMMON — LEASES — HOLDING OVER. — A and B leased a building of which they were cotenants, to a firm composed of B and C. Upon the expiration of the lease, B, against the will of A, gave the firm written permission to occupy the premises temporarily, pending removal. The lessees accordingly held over, whereupon A sued for his fraction of rent for the new year. *Held*, that the defendants are to be regarded as occupying the premises after the expiration of the lease as cotenants of the plaintiff, and are liable, at most, only for occupation rent. *Valentine* v. *Healy*, 178 N. Y. 391.

The tendency of the more recent decisions, as well as the English practice, is opposed to the New York rule that a tenant in common who has taken a lease of the moiety of his cotenant, is not liable as under a new lease for holding over. See *O'Connor* v. *Delaney*, 53 Minn. 247; *Leigh* v. *Dickeson*, L. R. 15 Q. B. D. 60. The New York court has, however, extended the principle by including within it the case stated. It is clear that the firm of B and C occupied the premises purely by virtue of the relationship of landlord and tenant which the lease established between it on the one side and A and B on the other; and it is difficult to see how it can be held to shift to the position of cotenant, especially since one of its members had no interest in the property. If a partnership may properly be considered a distinct legal entity, the view advanced becomes more difficult to support. See *Henry* v. *Anderson*, 77 Ind. 361; *Valentine* v. *Healy*, 86 Hun (N. Y.) 259. Furthermore, to attain the result reached here one must do violence to the rule that one tenant in common cannot bind his cotenant without the latter's consent. *Mussey* v. *Holt*, 24 N. H. 248.

TRUSTS — CREATION AND VALIDITY — REVOCATION. — The defendant's intestate made a deposit of her own money in a savings bank "as trustee for" the plaintiff. Later the account was transferred to her own name, and finally withdrawn; one-half of it was then redeposited in trust for the plaintiff, and remaining intact at the depositor's death was turned over to the former, who made claim for the balance. The plaintiff knew of neither deposit until a year after the depositor's death. *Held*, that the original trust is merely tentative, revocable at will until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration. *Totten* v. *Lattan*, 31 N. Y. L. J. 1717 (N. Y., Ct. of App., Aug. 5, 1904).

The New York court formerly held that a deposit by one person in trust for another raises the presumption that a trust was intended; and where no evidence of a contrary nature appeared, the beneficiary was allowed to recover. *Martin* v. *Funk*, 75 N. Y. 134; *contra*, *Clark* v. *Clark*, 108 Mass. 522. Where the depositor's real intent was to evade a rule of the bank, or to avoid taxation, this presumption is rebutted and no trust is created. *Brabrook* v. *Boston, etc., Bank*, 104 Mass. 228. The principal case expressly establishes a new doctrine in New York, and seems to lay down different rules according as the question arises before or after the donor's death, allowing revocation before death of what after death would be presumed an absolute trust. This would seem an unfortunate distinction, as it tends to obscure the vital question as to the intent of the donor at the time of making the deposit. If he then intended to create a trust, it should be irrevocable, unless the power of revocation was expressly reserved at that time. *Mabie* v. *Bailey*, 95 N. Y. 206.

TRUSTS — FOLLOWING TRUST PROPERTY — CONVEYANCE TO A VOLUNTEER. — A trustee at the request of the *cestui* conveyed the trust estate to a volunteer with notice. It was the intention of all the parties that the volunteer should hold free from the trust. *Semble*, first, that the volunteer took free from the trust; second, that this was not an assignment of an interest in land within Mass. Rev. Laws c. 127, § 3. *Matthews* v. *Thompson*, 71 N. E. Rep. 93 (Mass.). See NOTES, p. 53.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — LIABILITY FOR INTEREST. — The defendant's intestate retained certain extra commissions allowed him as trustee by a decree of the court. On an appeal taken from this decree, the decision was reversed and the plaintiff adjudged entitled to the sum thus retained. The plaintiff then sought to charge the defendant with interest. *Held*, that the plaintiff is not entitled to interest. *Southern Ry. Co.* v. *Glenn's Adm'r*, 46 S. E. Rep. 776 (Va.).

As the defendant kept his commissions in good faith and under judicial sanction, the court refused to charge him with interest. This result seems opposed to the general rule, which is well settled that a trustee is liable for interest on trust funds which he deals with in violation of the trust. *McComb* v. *Frink*, 149 U. S. 629. This rule is also followed where the trustee acts wrongfully but in good faith. *McCausland's Appeal*, 38 Pa. St. 466; see *Powell* v. *Hulkes*, 33 Ch. D. 552. There is, however, some authority for the view that where a fiduciary acts innocently, he will not be held liable for interest. *Pulliam* v. *Pulliam*, 10 Fed. Rep. 53. It is submitted that the

former rule is not only supported by the weight of authority, but is correct on principle. As the trustee has had the use of the money and has deprived the *cestui* of the benefit of it, it seems only fair to the latter to charge the trustee with interest. His good faith should make no difference in the result.

WATERS AND WATERCOURSES — NATURAL WATERCOURSES — RIPARIAN RIGHTS OF RAILWAY COMPANY TO ABSTRACT WATER FOR SUPPLYING LOCOMOTIVES. — A railway company, owning a narrow strip of land along a stream, laid a pipe between the stream and a tank from which they proposed to supply their locomotives with water. The defendant, who owned a mill situated lower down the stream, took up the pipe; whereupon the railway company sought an injunction against further interference by him. *Held*, that the injunction be refused, since the proposed user is unlawful, even though no material damage be caused thereby. *McCartney* v. *Londonderry, etc., Ry. Co.*, [1904] A. C. 301.

This is the third time that the question of a railway's right to take water from a stream for the use of its locomotives has been passed upon by an English court. In the first case, the use was forbidden because it impeded navigation. *Attorney-General* v. *Great Eastern Ry. Co.*, L. R. 6 Ch. App. 572. The second case, between a lower mill-owner and the railroad, was decided in favor of the latter. *Earl of Sandwich* v. *Great Northern Ry. Co.*, L. R. 10 Ch. D. 707. The present decision in the House of Lords overrules the last case, and definitely settles the point in England. The court proceeds upon the ground that as the water was to be used chiefly off the land its taking was unlawful *Cf. Swindon Waterworks Co.* v. *Wilts, etc., Navigation Co.*, L. R. 7 H. L. 697. Furthermore it is argued that while the mill-owner might suffer no material damage, nevertheless a right of his was being infringed which would in time give the railway company a right by prescription. Such infringement of a right is generally held actionable *Blodgett* v. *Stone*, 60 N. H. 167. The decision seems clearly sound and is in accord with the authorities in this country. *Clark* v. *Pennsylvania R. R. Co.*, 145 Pa. St. 438.

WATERS AND WATERCOURSES — SUBTERRANEAN AND PERCOLATING WATERS — RIGHT TO APPROPRIATE PERCOLATING WATERS. — *Held*, that a property owner may collect percolating waters for use off the land although he thereby drains a well on neighboring premises, the waters from which had been used only for domestic purposes. *Houston, etc., R. R. Co.* v. *East*, 81 S. W. Rep. 279 (Tex., Sup. Ct.).

This decision is in accord with the English rule. See 16 HARV. L. REV. 295; 17 *ibid.* 426.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

EXTRINSIC EVIDENCE IN AID OF INTERPRETATION. — This important and difficult subject is examined by Sidney L. Phipson in a recent article, *Extrinsic Evidence in Aid of Interpretation*, 20 L. Quar. Rev. 245 (July, 1904). The article is a clear discussion of Wigram's classic work and the many criticisms thereon, and offers independent ideas of value as well. Mr. Phipson stands by Wigram's treatment of interpretation as a question of evidence, thus taking issue with Professors Thayer and Wigmore. As to the object of interpretation — whether, as Wigram maintains, it is to ascertain the meaning of the words, or, as Hawkins and Thayer hold, to learn the intention of the writer — Mr. Phipson concludes that Hawkins's hypothesis is preferable. He finds the rejection of declarations of intention, when strictly considered, not really in conflict with Hawkins's contention. He thinks it not necessary, however, to adopt either theory in its more rigid form and approves Professor Graves's standpoint "that the object is to discover the meaning of the words as intended by the testator." Coming to the two opposing classifications and general rules as to the evidence receivable, Mr. Phipson again prefers Hawkins to Wigram. After elaborate